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No. 83-1268

In the Supreme Court of the United States

October Term, 1983

L. & L. HOWELL, INC.,
Petitioner,

vs.

CINCINNATI COOPERATIVE MILK SALES ASSOCIATION

and

MIAMI VALLEY MILK PRODUCERS ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Nos. 81-3491/3492

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS S. KILBANE, *Counsel of Record*
SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500
Counsel for Respondents

Of Counsel:

ERIC M. OAKLEY
SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115

GLEN W. WAGNER
3858 North Cliff Road
Port Clinton, Ohio 43452

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Whether the respondent Capper-Volstead dairy cooperatives which lawfully represented 80% to 85% of the dairy farmers living in the geographic area where petitioner Howell had chosen to operate a milk hauling business were precluded by the Sherman Act from negotiating for the lowest milk hauling rate acceptable to Howell.

TABLE OF CONTENTS

QUESTION PRESENTED I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES II
COUNTER-STATEMENT OF THE CASE 1
ARGUMENT 3

I. The Sixth Circuit Decision Was Based on the Application of Uncontested Legal Principles to the Particular Facts of the Case and the Case, Therefore, Has No Precedent Value 3

II. Howell's Arguments for Certiorari Are Without Merit 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2108 (1983) 5

Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967) 4

Fairdale Farms v. Yankee Milk, Inc., 635 F.2d 1037 (2nd Cir. 1980), *cert. denied*, 454 U.S. 818 (1981) 4

Fairdale Farms, Inc. v. Yankee Milk, Inc., 715 F.2d 30 (2nd Cir. 1983), *cert. denied*, 52 U.S.L.W. 3510 (1984) 5, 8

GVF Cannery, Inc. v. California Tomato Growers Ass'n, 511 F. Supp. 711 (N.D. Cal. 1981) 5

Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608 (M.D. Ga. 1981), *aff'd* 715 F.2d 520 (11th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3612 (1984) 5

Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960) 3

National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978) 4

Northern Cal. Supermarkets, Inc. v. Central Cal. Lettuce Producers Cooperative, 413 F. Supp. 984 (N.D. Cal. 1976), *aff'd* 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) 5

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962) 3, 4

Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974) 4

United States v. Dairymen, Inc., 660 F.2d 192 (6th Cir. 1981) 5

Statutes

Capper-Volstead Act, Section 1, 7 U.S.C. § 291 .....*passim*

Sherman Act, Sections 1 & 2, 15 U.S.C. §§ 1 and 2 ....*passim*

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The respondents, Cincinnati Cooperative Milk Sales Association and Miami Valley Milk Producers Association, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 20, 1983.

COUNTER-STATEMENT OF THE CASE

In May 1972 petitioner L. & L. Howell, Inc. was asked by the respondent Capper-Volstead dairy cooperatives, Cincinnati Cooperative Milk Sales Association and Miami Valley Milk Producers Association, to haul the milk from

some of their respective members' farms to their common customer The Kroger Company in Cincinnati, Ohio.

Howell agreed to the cooperatives' request and operated for a year and a half pursuant to an oral arrangement with the cooperatives that was terminable at will. The relationship was formalized in a written contract with Cincinnati Coop in November 1973. That written contract was for a one-year term, subject to automatic renewal unless terminated by either party. Throughout the four-year period prior to the filing of its complaint in 1976 Howell was fully paid on the basis of hauling rates established by the parties in their oral and written arrangements.

At various times throughout that period Howell complained that the agreed upon rates were insufficient. At no time, however, during the oral arrangement did Howell put the cooperatives to the test of paying more or finding another hauler. Nor did Howell terminate the later, written contract as it was entitled to do. Howell kept on hauling and the cooperatives kept on paying at the agreed rate.

While continuing to haul milk of the cooperatives' members to The Kroger Company in Cincinnati, Howell filed this suit claiming damages to be measured by the difference between the agreed upon rate that had been paid by the cooperatives and some allegedly more "reasonable" rate to be determined by jury trial. The Court of Appeals for the Sixth Circuit did not have to reach the question of how a court, or jury, would go about evaluating the "reasonableness" of a rate agreed upon by the parties. Rather, it held, as a matter of law, that the respondent cooperatives—admitted by Howell and found by the trial court to be qualified cooperatives under Section 1 of the Capper-Volstead Act (7 U.S.C. § 291)—were not precluded by the Sherman Act from offering to pay the lowest rate that Howell would accept to haul their member's milk.

ARGUMENT

I. THE SIXTH CIRCUIT DECISION WAS BASED ON THE APPLICATION OF UNCONTESTED LEGAL PRINCIPLES TO THE PARTICULAR FACTS OF THIS CASE AND THE CASE, THEREFORE, HAS NO PRECEDENT VALUE

The Capper-Volstead exemption to antitrust liability provides, in pertinent part, that:

> "Persons engaged in the production of agricultural products as . . . dairymen . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . ."

7 U.S.C. § 291. This Court described that exemption in *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 466 (1960), stating that it permits farmers to "organize together, set association policy, fix prices at which their cooperative will sell their produce and otherwise carry on like a business without violating the antitrust laws." Two years later this Court confirmed the point in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 28 (1962), observing that the Capper-Volstead Act specifically permits "concerted efforts by farmers in the processing, preparing for market, and marketing of their products."

Those principles have been easily and consistently applied by the courts of appeals, including the Sixth Circuit. In fact, since its 1962 decision in *Sunkist Growers*, this Court has repeatedly denied petitions seeking review as to the scope[1] of the Capper-Volstead Act "exemption".

In *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974), the Ninth Circuit upheld the dismissal of a claim against two potato cooperatives for allegedly violating Section 1 of the Sherman Act by agreeing upon the pricing terms they would seek from potato buyers, saying at page 214:

> "If Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, permits a common marketing agency, separate from the cooperatives themselves, it would follow that without such a separate agency, the associations may act together in marketing and make the necessary contracts to accomplish their legitimate purpose. If an act of the agent is lawful, the same act performed by the principal is also lawful."

In *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037, 1040 (2nd Cir. 1980), *cert. denied*, 454 U.S. 818 (1981), the Second Circuit gave short shrift to the argument that Sections 1 and 2 of the Sherman Act put some mystical limitation upon the extent to which farmers and their

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1. On two occasions since 1962 this Court has granted certiorari to consider questions concerning the application of the Capper-Volstead Act to an entity made up, in part, of members who were not "farmers". *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), and *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978). No such "status" issue is involved in this case, however. Petitioner acknowledges that both respondents were duly organized and existing under the cooperative laws of Ohio and the Capper-Volstead Act; that all of their members were dairy farmers; and that their membership was lawfully obtained. Petition i, 3, 6.

cooperatives may voluntarily combine to market their product more economically:

> "By exempting farmers from Sherman Act limitations on the ability to combine into cooperatives, Capper-Volstead gives farmers the right to combine into cooperative monopolies. The Act places no limits on combination; it does not forbid farmers from combining after their cooperative reaches a certain size. For a court to impose such limits and hold cooperatives liable for treble damages if they run afoul of a judicial standard would discourage the growth of these cooperatives."

The Second Circuit confirmed that view upon a second appeal of the case a year later which this Court also declined to review. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 715 F.2d 30 (2nd Cir. 1983), *cert. denied*, 52 U.S.L.W. 3510 (1984). See also, *Northern Cal. Supermarkets, Inc. v. Central Cal. Lettuce Producers Cooperative*, 413 F. Supp. 984 (N.D. Cal. 1976), *aff'd* 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2108 (1983); *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608 (M.D. Ga. 1981), *aff'd* 715 F.2d 520 (11th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3612 (1984).

Other recent cases applying the same propositions of law which this Court was not asked to review include: *GVF Cannery, Inc. v. California Tomato Growers Ass'n*, 511 F. Supp. 711 (N.D. Cal. 1981); and *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981).

In sum, the cases are as clear as the statute: two or more Capper-Volstead cooperatives may join in their efforts to market the products of their members to their

best economic advantage. As the decision of the Sixth Circuit in this case notes, that is all that happened here:

> ". . . the evidence indicates that the only factor coercing Howell into accepting the price proposed by the cooperatives was the fact that the cooperatives, between them, had some 80% to 85% of the dairy farmers in that area as members. This near monopoly status is precisely what the Capper-Volstead Act makes lawful, and it would not be unlawful even if defendants controlled 100% of the farmers. The evidence does not suggest that the cooperatives sought to expand their monopoly power by setting the price of milk hauling or eliminating competition among haulers; the cooperatives themselves did not engage in milk hauling and evidenced no intention of doing so. They simply obtained an advantageous price of hauling for the benefit of their members and the cooperatives were free if they wished to award a hauling contract to another milk hauler. Howell was not 'required' to accept the proposed price, and they pursued actions made lawful under the Capper-Volstead Act." Petition 7a.

* * * * *

> "Here defendants were effectuating legitimate objectives by obtaining an apparently advantageous hauling arrangement." Petition 8a.

* * * * *

> "Proposing a price to plaintiff Howell, even if unreasonably low, is simply not the type of predatory or anticompetitive behavior that courts have found forbidden to dairy cooperatives. Plaintiff Howell was not coerced into accepting the low price to eliminate or restrain competition, and the Capper-Volstead Act protects cooperatives that lawfully acquire and use their monopoly power." Petition 9a.

Howell has never contested the factual underpinnings of the Sixth Circuit's conclusions and its Petition for Certiorari simply ignores the plain words of the applicable statute and cases, all of which mandated the Sixth Circuit's decision. There is not, therefore, any precedent value in this case.

II. HOWELL'S ARGUMENTS FOR CERTIORARI ARE WITHOUT MERIT

Howell asserts that the Sixth Circuit's decision somehow frustrates the purpose of Section 1 of the Capper-Volstead Act because it invites, or even encourages, cooperatives to offer unreasonably low rates to haulers, or other third parties, whose services are necessary to get the farmers' products to market.

In plainer words, Howell's argument is that cooperatives should not be permitted to compete. No legislative history or other authority is cited to support that claim. And, there is none. All the cases considered in the preceding section of this brief—and noticeably absent from meaningful discussion in the Petition for Certiorari—make it clear that the purpose of Section 1 of the Capper-Volstead Act is to provide an exception to the Sherman Act so that farmers may enhance their competitive economic position by joining together in the processing, preparing, and marketing of their products. None of the cases cited on page 8 of the Howell Petition for the general proposition that exemptions from the antitrust laws must be narrowly construed hold, or even suggest otherwise. In fact, none of those cases have anything to do with farmer cooperatives or the Capper-Volstead Act.

Section 1 of the Capper-Volstead Act does not purport to limit the amount of economic enhancement that coopera-

tives may lawfully obtain for their member farmers to some unspecified, but "reasonable" level. Even the Sherman Act itself does not charge federal courts and juries with the duty of regulating the prices paid in our economy to assure that some unquantified levels of "reasonableness" are maintained.

> "In enacting the Sherman Act, Congress recognized that the 'reasonableness of prices has no constancy.' *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S. Ct. 811, 843, 84 L. Ed. 1229 (1940). 'The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow,' *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S. Ct. 377, 379, 71 L. Ed. 700 (1927), and courts are poorly equipped to undertake the 'heavy, continuous, and unguided burden' of determining reasonableness, III Areeda and Turner, *Antitrust Law* ¶710, at 149 (1978); see Sullivan, *Handbook of the Law of Antitrust* 117-18 (1977)."

Fairdale Farms, Inc. v. Yankee Milk, Inc., 715 F.2d 30, 32 (2nd Cir. 1983), *cert. denied*, 52 U.S.L.W. 3510 (1984).

Simply put, there is no merit to Howell's assertion that the purpose of the Capper-Volstead Act—unlike the Sherman Act—is to require the federal court system to determine the reasonableness of prices charged or rates paid by dairy farmers when acting together in cooperatives having "lawfully acquired monopoly power."

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

THOMAS S. KILBANE, *Counsel of Record*
SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500
Counsel for Respondents

Of Counsel:

ERIC M. OAKLEY
SQUIRE, SANDERS & DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115

GLEN W. WAGNER
3858 North Cliff Road
Port Clinton, Ohio 43452